In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM, AND TO THE SEPARATE MOTION OF APPELLEE BELOIT DAIRY COMPANY

Various statements made in appellees' motion to dismiss or affirm are, in the view of the Government, incomplete or misleading. In challenging such statements in this brief, we necessarily make somewhat detailed reference to the proceedings below. We also answer appellee Beloit Dairy Company's separate motion to dismiss or affirm.

I. The Eggleston Deposition

The district court did not permit the Government to use Eggleston's deposition in examination of this

hostile witness. Appellees do not contend that use of the deposition, after it had been unsealed, was correctly barred, but they contend, in effect, that the ruling was harmless error. The grounds given for this conclusion are that: (1) "much" of the deposition was consistent with Eggleston's trial testimony, (2) it largely dealt with incidents occurring prior to the 1940 cut-off date fixed by a pretrial order, and (3) it duplicated material used by the Government in an effort to impeach.

We submit that the Government was prejudiced when it was not permitted to show discrepancies between the deposition and trial testimony which were calculated to impair Eggleston's credibility. In this connection, it is immaterial that the deposition dealt with some incidents which the trial testimony does not cover, or that parts of the deposition may be consistent with Eggleston's trial testimony. As to appellees' suggestion that there was available to the Government material which "duplicates" the Eggleston deposition, we deny that this was the case. The Eggleston affidavit, to which appellees refer, was merely a summary statement of the general facts covered by the deposition. It does not contain the specific, detailed facts found in the deposition, concerning which Eggleston was questioned at the trial.

Examples of contradictions between Eggleston's deposition and his trial testimony, which the Government was not permitted to show, are set forth below:

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(a) At the trial Eggleston, a former officer of Bowman, was asked about a price war between Bowman's fighting subsidiary, Ridgeview, and a competitor (Hawthorn). In his deposition Eggleston had testified (Offer of Proof filed March 10, 1953, p. 10):

> We had men follow behind their (Hawthorn's) trucks and get the names and addresses of their stores and we turned them over to Ridgeview and they sent solicitors in there; and we sold milk as low as five cents a quart off the Ridgeview trucks and—
>
> Q. Then what happened?
>
> A. And Hawthorn was forced to meet that price on a number of accounts.

At the trial, however, Eggleston testified that Ridgeview met Hawthorn's prices where "necessary to hold our business" and that "at no time did we go below their prices" (Tr. 542-3).

(b) In his deposition Eggleston testified that he made an agreement with Hawthorn's representative that "we [Ridgeview] would not take any more of their accounts" and "they wouldn't take any more of our accounts" (Offer of Proof, *supra*, p. 11). But at the trial, when asked whether the parties had said anything about not soliciting each other's accounts, his answer was (Tr. 548): "I told them we were not going to allow our men to go out and solicit their accounts and cut our price."

(c) In his deposition Eggleston testified that, during the time he was with Bowman, Ridgeview

was not operated at a profit and that Bowman "absorbed the loss of that company" (Offer of Proof, *supra*, p. 7). But when asked at the trial whether Ridgeview was operated at a loss, he replied: "That I wouldn't know. I had nothing to do with the financial statements" (Tr. 483).

II. The Newey Tape Recordings

Appellees have not answered the Government's contention that the district court erred when it ruled that the tape recordings which the Government sought to put in evidence were within the privilege accorded to the "work product" of a lawyer.[1] But appellees contend that the Government did not offer the tapes or a transcript thereof in evidence and "presumably chose to rely upon the testimony of witness Newey." However, as we show below, the Government did seek to have the tapes received as evidence and, only after the court had rejected such evidence, did it introduce Newey as a witness.[2]

Subsequent to the ruling that McConnell need not produce the tapes in response to the Government's subpoena, Government counsel advised the court

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[1] Appellees' reference to Judge Igoe's ruling in the *Dean* case is entirely inapposite. In that case, but not here, the tapes were material which a lawyer had in his possession preparatory to trial of the cause for which the material had been obtained, and in that case, but not here, it was counsel for an adverse party who sought production.

[2] The court's ultimate ruling rejecting all of Newey's testimony upon the grounds that it was not based on present recollection and did not constitute "past recollection" recorded underlines the injury to the Government resulting from the erroneous ruling rejecting the recordings.

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that it had subpoenaed Newey as a witness and that Newey had the tapes in his possession and was refreshing his recollection by examining them. Government counsel then said (Tr. 2211):

> It is a question of whether or not this court is going to hear those tapes, and if the Court is going to hear them the government, of course, would like to have permission from the court to set up in the court room the necessary equipment so that the tapes can be played.

The court thereupon asked if McConnell was waiving his privilege, and Government counsel handed to the court the letter from McConnell authorizing Newey to submit the tapes to the defendants and to the Government for their use in this case "if the Court sees fit to require you to do so." The court, after reading this letter, again ruled against admitting the tapes in evidence, saying that "the ruling made at the time Mr. McConnell asked for it still stands," and that there "is no use of producing the tape recordings here" (Tr. 2212-3).

Appellees further contend, that since the Government made no offer of proof with respect to the tapes, it may not, on appeal, urge reversible error respecting rejection of this evidence.[3] However, the law is clear that a formal offer of proof is not

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[3] Appellees cite *Herencia* v. *Guzman*, 219 U.S. 44, 46, in support of this proposition, but that case merely holds that a judgment will not be set aside upon the ground of erroneous exclusion of evidence if the record does not disclose what was the nature or significance of the excluded testimony.

essential to preserve the question of erroneous exclusion of evidence if it is clear from the record as a whole what was the nature of the excluded testimony. *Hoffman* v. *Palmer,* 129 F. 2d 976, 994 (C.A. 2, 1952), 318 U.S. 109; *Maguire* v. *Federal Crop Ins. Corp.,* 181 F. 2d 320, 321-322 (C.A. 5, 1950); *Meaney* v. *United States,* 112 F. 2d 538, 539 (C.A. 2, 1940).

Since Newey's testimony, which covered some 139 pages of transcript (Tr. 2228-2367), identifies and describes the conversations which the tapes had recorded, the record fully discloses the character and contents of the rejected evidence. Moreover, McConnell, the attorney for the plaintiff in the private antitrust suit who had possession of the tapes, testified as follows as to what they involved (Tr. 168-9):

> He was an employee of mine, your Honor, and I put him to work in a grocery store taking tape recordings of what went on between the grocery owners and the different solicitors from the different dairies, and they are tape recordings of those conversations.

The appellees appear to urge that the probative value of the tapes must be heavily discounted because only one of the dairy salesmen whose conversations are recorded was a representative of an appellee.[4] However, all the salesmen in question represented companies charged as having conspired

[4] The tapes record a conversation with a Borden salesman (Tr. 2253-4), but none with a Bowman representative, and the Government therefore corrects the statement made in its jurisdictional statement that conversations with representatives of both of these companies were recorded.

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with the present appellees to violate the Sherman Act.[5] Admissions by agents of these defendants are clearly admissible against their co-conspirators, the present appellees.

III. The Illinois Dead Man's Statute

Appellees do not attempt to show that the district court correctly applied the statute, but urge as a defense that the Government did not assign the right reason for its objection to the court's ruling. However that may be when this matter came up during the first day of trial (Tr. 29), the court refused to allow Government counsel to state the ground of his objection when exclusion of evidence on the basis of the dead man's statute arose on the fifth day of trial. The following then transpired (Tr. 769-70):

> The COURT: The objection is sustained.
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> Mr. JINKINSON: Your Honor, this is the first time, I think, that we have a clear-cut issue in reference to the dead man's statute since it came up the first time. Since that time we briefed the law; I would like to be heard on it.
>
> The COURT: The ruling will stand. Proceed.

Manifestly, appellees cannot rely upon failure by the Government to state the correct grounds for objection to the court's exclusion of evidence when

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[5] The tapes record conversations by, among others, Kost of American Processing and Sales Co. (Tr. 2234); Galnick of Capitol Dairy Co. (Tr. 2266); Chernow of Western United Dairy Co. (Tr. 2272) and Boysen of Hunding Dairy Co. (Tr. 2283-2284). These companies were all named defendants in the Government's complaint, and have entered into a consent decree with the Government enjoining them from further violating the antitrust laws.

the Government was denied opportunity to state the grounds of its objection.

IV. Dismissal of Charges of Clayton Act Violation

Appellees indicate that the court below dismissed the charges of violating Section 2 of the Clayton Act, not because it regarded the decree entered in the private antitrust litigation as rendering relief of this kind unnecessary, but because it saw no danger of further violation of Section 2. Appellees accordingly contend that this aspect of the case is controlled by *United States* v. *W. T. Grant Co.*, 345 U.S. 629, where it was held that the question whether there is "some cognizable danger of recurrent violation" involves an exercise of judicial discretion, which will be reversed only on a strong showing of abuse.

The district court, in the opinion which it rendered, said that there is "one factor" which compelled it to hold that Borden and Bowman need not defend against the Clayton Act charge, and that that factor was the judgment entered in the *Dean* case. Later in the opinion the court said that the *Dean* decree "assures, as completely as any decree can assure, that there will be no new violations." That the district court acted primarily on the basis of this judgment is shown by its rejection of an additional conclusion of law proposed by appellees Bowman and Ridgeview which, as they asserted, was based upon and reflected the decision of the Supreme Court in the *Grant* case (Bowman and Ridgeview Motion to Amend, filed June 29, 1953, pp. 2-3). The additional conclusion of law, which the court did not adopt, reads:

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> Before exercising its power to grant injunctive relief, the Court must determine that there exists some cognizable danger of recurrent violations of law. Proof of past violations of the Clayton Act is not in itself sufficient to warrant the granting of injunctive relief if there is no significant threat of future violation.

We submit that the issue raised by the Government's appeal, whether entry of judgment in a private antitrust action may deprive the Government of its right to obtain a similar decree in its own action, is squarely presented by the appeal in this case, and is not answered in appellees' motion to affirm.

V. Beloit's Motion To Dismiss or Affirm

Appellee Beloit has moved to dismiss the appeal upon the ground that the Government's motion for a new trial did not toll the running of the appeal time as to Beloit. The question is whether that motion raised "questions of substance" as distinguished from "mere matters of form." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177. The motion for a new trial clearly did raise questions of substance as to the remaining appellees, and they have not questioned that the motion tolled the appeal time as to them. It would seem that a motion for a new trial raising questions of substance as to all but one defendant, should toll the running of the statutory time for appeal as to all the parties, at least when, as here, all the defendants are charged with having conspired together. Any

other conclusion would result in piecemeal appeals, a result opposed to the policy expressed by Congress. See *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30.

We submit that, in any event, the motion for a new trial did raise questions of substance involving Beloit. The motion attacked the court's pre-trial ruling that evidence relating to pre-1940 incidents would be excluded. Had the court reversed itself on this point, the Government would have been in a position to introduce evidence establishing the origins of the conspiracy as to all of the appellees, including Beloit. While the present appeal does not attack the court's cut-off date ruling, the substantive character of the issues raised by the motion for a new trial must be determined from that motion, not from the later appeal papers.

The motion also attacked the court's exclusion of the Newey tape recordings. These tapes contained a conversation with an agent of another defendant, in which the agent linked Beloit to the conspiracy (Tr. 2238).

For the foregoing reasons, we submit that the motions to dismiss or affirm the appeal should be denied.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER 1953.

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